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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 CHARLES MOUNCE,

9 Plaintiff,

10 v.

11 USAA GENERAL INDEMNITY  
COMPANY,

12 Defendant.

CASE NO. 2:22-cv-1720

ORDER DENYING PLAINTIFF'S  
PENDING MOTIONS

13  
14 **1. INTRODUCTION**

15 This case involves an insurance dispute between Plaintiff Charles Mounce  
16 and Defendant USAA General Indemnity Company about subrogated funds and  
17 claims handling. Mounce filed a second motion for partial summary judgment and  
18 seeks leave to file a third. Dkt. Nos. 86, 96. The Court has considered the papers  
19 submitted in support of and opposition to the motions, as well as oral argument by  
20 the parties. For the reasons stated below, the Court DENIES Mounce's motions.

21 **2. BACKGROUND**

22 On October 3, 2017, Mounce was injured in a motor vehicle accident while  
23 riding as a passenger in a car driven by Dale Ann Pyles. Dkt. No. 25 at 2. Another

1 driver, Ryan Fox, caused the accident. Dkt. No. 26-1 at 46. Pyles held an USAA  
2 insurance policy that included personal injury protection (PIP) benefits up to  
3 \$10,000 and Underinsured Motorist (UIM) benefits up to \$50,000 per person. Dkt.  
4 No. 28 ¶ 2. Pyles's USAA policy states:

5       If we make a payment under this policy and the person to or for whom  
6       payment was made has a right to recover damages from another, we will  
7       be subrogated to that right. The person to or for whom payment was  
8       made shall do whatever is necessary to enable us to exercise our rights,  
9       and shall do nothing after loss to prejudice them.

10 Dkt. No. 28-1 at 38.

11       On October 9, 2017, USAA informed Mounce he was covered under Pyles's  
12 PIP policy and explained its subrogation interest in damages received from Fox or  
13 his insurer, State Farm. Dkt. Nos. 25 at 2; 26-1 at 48. USAA's letter to Mounce  
14 stated,

15       If you retain an attorney to assist you, we will pay a pro-rata share of  
16       the attorney's fees if the attorney successfully obtains the entire amount  
17       of our PIP payments for us. If the attorney does not obtain the entire  
18       amount of our PIP payments for us, we will not approve any settlement  
19       with the at-fault party, and we will request that you do not sign any  
20       release that does not specifically protect our recovery rights.

21 Dkt. No. 26-1 at 49.

22       Between November 2017 and October 2018, USAA paid Mounce's medical  
23 providers a total of \$9,910.45 for his various treatments. Dkt. Nos. 28 ¶ 3; 28-2 at 2–  
5.

6       On July 30, 2020, USAA contacted State Farm for a status update on  
7 Mounce's liability claim. Dkt. Nos. 29 ¶ 9; 29-3 at 3. State Farm stated the liability  
8 claim was closed due to a lack of response by Pyles and Mounce. *Id.* With the

1 statute of limitations approaching in October, USAA filed for inter-company  
2 arbitration against State Farm. Dkt. No. 29 ¶ 10. USAA never completed the inter-  
3 company arbitration, however, because State Farm issued USAA a payment for the  
4 subrogated amount of \$9,910.45 in early September 2020. *Id.* ¶¶ 11–12.

5 Mounce filed a complaint against Fox in September 2020. Dkt. No. 26-1 at 64.  
6 Mounce did not inform USAA of his suit against Fox. Dkt. No. 90 ¶ 2 (“[Mounce] did  
7 not disclose to USAA the date he filed the underlying suit until after the pending  
8 litigation had commenced. [Mounce] disclosed the date he filed the underlying  
9 lawsuit on or about July 13, 2023.”). Before the trial, Mounce waived his claim to  
10 payment of past medical expenses and stated that he would only pursue damages  
11 related to future medical care, replacement services, and noneconomic damages.  
12 Dkt. No. 28-14 at 16–17. Mounce did not inform USAA that he waived past medical  
13 expenses. Dkt. No. 90 ¶ 3. The jury rendered a verdict for Mounce in the amount of  
14 \$20,000. Dkt. No. 33 at 29. In addition, it awarded Mounce’s spouse \$5,000 for loss  
15 of consortium. *Id.*

16 In a June 2, 2022, stipulation State Farm agreed to pay Mounce an  
17 additional \$5,089.55 in exchange for Mounce forgoing an appeal and agreed to  
18 “waive” the \$9,910.45 PIP payment. Dkt. No. 33 at 29–30.

19 Mounce now argues that USAA must pay a pro rata share of the attorneys’  
20 fees and costs that his counsel expended in obtaining the jury verdict against Fox.  
21 Dkt. No. 86 at 5. Specifically, counsel states it accrued \$21,160.47 in costs and  
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1 \$13,510.06 in fees and Mounce seeks a summary judgment order stating that, as a  
 2 matter of law, USAA owes a pro rata share of \$9,910.45.<sup>1</sup> *Id.*

### 3 3. DISCUSSION

#### 4 3.1 Legal standard.

5 “[S]ummary judgment is appropriate when there is no genuine dispute as to  
 6 any material fact and the movant is entitled to judgment as a matter of law.”  
 7 *Frlekin v. Apple, Inc.*, 979 F.3d 639, 643 (9th Cir. 2020) (citation omitted). A dispute  
 8 is “genuine” if “a reasonable jury could return a verdict for the nonmoving party,”  
 9 and a fact is material if it “might affect the outcome of the suit under the governing  
 10 law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a  
 11 summary judgment motion, courts must view the evidence “in the light most  
 12 favorable to the non-moving party.” *Barnes v. Chase Home Fin., LLC*, 934 F.3d 901,  
 13 906 (9th Cir. 2019) (internal citation omitted).

#### 14 3.2 Questions remain as to whether Mounce’s recovery from State Farm 15 qualifies as a common fund.

16 Washington recognizes an exception to the general rule that parties do not  
 17 share attorneys’ fees in cases involving a common fund. *Matsyuk v. State Farm Fire*  
 18 *& Cas. Co.*, 272 P.3d 802, 804 (Wash. 2012). Under the common fund exception, also  
 19 known as the “*Mahler* rule,” “a personal injury protection (PIP) insurer [must] share

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 21 <sup>1</sup> It’s unclear from Mounce’s briefing how he arrived at this figure. It is the same  
 22 amount as the amount of PIP funds used by Mounce and collected by USAA from  
 23 State Farm. At oral argument, the Court asked Mounce’s counsel to explain its  
 formula for calculating the sum Mounce requested. Counsel did not provide a  
 proposed method for calculating the pro rata share. USAA proposes \$9,384.74 and  
 Mounce does not object to this calculation. Dkt. No. 88 at 10.

1 pro rata in the attorney fees incurred by an injured person when the recovery  
2 benefits the PIP insurer.” *Id.* at 804–05. “The equitable sharing rule derives from  
3 principles of equity, not contract language.” *Id.* at 807. “In general, the insurer has  
4 no right of reimbursement until the insured is fully compensated for a loss. But, the  
5 insured and the tortfeasor may not knowingly prejudice the insurer’s right to  
6 reimbursement.” *DeTurk v. State Farm Mut. Auto. Ins. Co.*, 967 P.2d 994, 996  
7 (Wash. Ct. App. 1998) (citing *Mahler v. Szucs*, 957 P.2d 632, 643 (Wash. 1998)).

8 To establish his entitlement to a pro rata share of attorneys’ fees Mounce  
9 must show that: (1) he created a common fund through his litigation efforts; (2)  
10 USAA benefited from this fund; and (3) “equity requires that the cost of procuring  
11 the common fund be shared by those who benefit from it.” 35 WA. PRAC.,  
12 WASHINGTON INSURANCE LAW AND LITIGATION § 30:10 (2024-2025 ed.) (citing *Hamm*  
13 *v. State Farm Mut. Auto. Ins. Co.*, 88 P.3d 392 (Wash. 2004)); *see also Matsyuk*, 272  
14 P.3d at 805–806. This rule applies even though insurers can also recover PIP funds  
15 from third parties via interinsurer arbitration. *See DeTurk*, 967 P.2d at 995  
16 (rejecting an insurer’s argument that it should not have to pay pro rata fees because  
17 the funds the insured recovered “were recoverable in interinsurer arbitration”  
18 (internal quotation marks omitted).

19 Mounce’s motion fails because there are genuine disputes of material fact  
20 regarding whether USAA benefited from his recovery from Fox. Unlike typical  
21 cases, the facts here present unusual circumstances that distinguish this case from  
22 the precedents Mounce relies upon. First, USAA had already recovered its PIP  
23 payments directly from State Farm through its own negotiations before Mounce

1 obtained his verdict. Second, Mounce explicitly waived recovery of past medical  
2 expenses at trial, which covered the PIP funds paid by USAA. As USAA argues,  
3 these facts raise substantial questions about whether USAA benefited from  
4 Mounce's litigation efforts against Fox.

5 USAA contends it did not benefit from Mounce's recovery because: (1)  
6 Mounce's verdict did not include any amount for past medical expenses, as he  
7 explicitly waived that category of damages (Dkt. No. 28-14 at 16-17); (2) USAA had  
8 already obtained its PIP reimbursement directly from State Farm before Mounce's  
9 verdict (Dkt. No. 29 ¶¶ 11–12); and (3) the post-verdict settlement provision stating  
10 that State Farm "waived" the previous PIP payment (Dkt. No. 33 at 29–30) did not  
11 create any actual benefit to USAA. Dkt. No. 88 at 13-14.

12 Mounce argues that the settlement with State Farm created a fund from  
13 which USAA benefited, regardless of how the underlying parties allocated the  
14 damages. Dkt. No. 92 at 3–4. Mounce relies on *Leader Nat. Ins. Co. v. Torres*, 779  
15 P.2d 722, 725 (Wash. 1989), which held that an insured "cannot contract out of its  
16 obligation to reimburse its insurance company." But the procedural posture in  
17 *Leader* differs significantly from this case. In *Leader*, the insured was attempting to  
18 avoid reimbursing the insurer after receiving settlement funds, whereas here,  
19 USAA had already obtained reimbursement before Mounce's verdict and  
20 settlement.

21 The unique sequence of events here—specifically, that USAA obtained its  
22 reimbursement before Mounce's verdict, and Mounce's express waiver of past  
23 medical expenses—distinguishes it from the common fund cases Mounce relies on.

1 These factual disputes about whether USAA benefited from Mounce's litigation  
2 efforts preclude summary judgment on his *Mahler* fee claim.

3 **3.3 The Court denies USAA's request for sua sponte summary judgment.**

4 USAA argues that the Court should not only deny Mounce's motion but also  
5 enter summary judgment in USAA's favor, without requiring a formal cross-motion,  
6 because "Mounce prejudiced [USAA's] right to recover PIP fees in violation of their  
7 contract provision." Dkt. No. 88 at 10. USAA contends that "[w]here an insured's  
8 failure to comply with express coverage terms results in actual prejudice to the  
9 insurer, the noncompliance extinguishes the insurer's liability under the policy." *Id.*  
10 at 13 (citing *P.U.D. of Klickitat Cty v. Int'l Ins. Co.*, 881 P.2d 1020 (Wash. 1994)).

11 The Court declines to grant sua sponte summary judgment to USAA for two  
12 reasons. First, whether Mounce's decision to waive medical specials at trial  
13 breached the policy's cooperation clause presents a disputed question of fact. The  
14 policy requires that the insured "shall do nothing after loss to prejudice [USAA's  
15 rights]," but Mounce maintains that his litigation strategy did not prejudice USAA  
16 because USAA had already recovered its PIP payments directly from State Farm.  
17 Dkt. No. 92 at 5–6.

18 Second, even if Mounce's decision to waive medical specials could constitute a  
19 breach, whether that breach prejudiced USAA remains disputed. USAA recovered  
20 the full amount of its PIP payments (\$9,910.45) from State Farm before Mounce's  
21 trial against Fox even began. Dkt. No. 29 ¶¶ 11–12. The record does not establish  
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23

1 that USAA suffered actual prejudice when it had already received complete  
2 reimbursement.

3 Given these disputed issues of material fact, sua sponte summary judgment  
4 is inappropriate. *See Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548,  
5 553 (9th Cir. 2003) (sua sponte summary judgment is appropriate only where “the  
6 losing party has had a ‘full and fair opportunity to ventilate the issues involved in  
7 the matter.’”) (quoting *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 312 (9th Cir.1982)).

### 8 **3.4 Mounce’s request for *Olympic Steamship* fees is premature.**

9 Mounce also requests attorney fees under *Olympic S.S. Co. v. Centennial Ins.*  
10 *Co.*, 811 P.2d 673 (Wash. 1991), which allows an insured to recover attorneys’ fees  
11 when “compelled to assume the burden of legal action to obtain the benefit of its  
12 insurance contract.” *Id.* at 681; *see* Dkt. No. 86 at 10–12. Because the Court is  
13 denying Mounce’s motion based on disputed issues of material fact regarding the  
14 common fund doctrine, the Court need not reach the *Olympic Steamship* issue right  
15 now. If Mounce ultimately prevails on his claim that USAA owes him a pro rata  
16 share under the Mahler doctrine, the *Olympic Steamship* issue may become  
17 relevant at that point. *See Woodley v. Safeco Ins. Co.*, 82 P.3d 660, 774 (Wash. 2004)  
18 (considering *Olympic Steamship* fees after determining that the insured was  
19 entitled to a pro rata share of legal expenses under *Mahler*).

**3.5 The Court denies Mounce’s request for leave to file a third summary judgment motion.**

In a separately filed motion, Mounce seeks permission to file a third summary judgment motion on the narrow issue of dismissing certain of Defendant’s affirmative defenses. Dkt. No. 96. Mounce contends that discovery has revealed “undisputed facts which make Summary Judgement appropriate” and that “[t]here is no question of material fact on these matters, and they must be decided as a matter of law.” *Id.* at 5. He asserts this motion would “conserve judicial resources and streamline the upcoming trial.” *Id.*

The Court could not disagree more. This would constitute Mounce’s *third* attempt at partial summary judgment, following motions filed in July 2023, Dkt. No. 25, and September 2024, Dkt. No. 84. While courts have discretion to permit successive summary judgment motions, *see Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010), Mounce has remarkably failed to articulate any compelling justification for yet another bite at the apple. Despite two prior opportunities, he now seeks to carve out additional issues for piecemeal adjudication after the dispositive motions deadline has passed and with trial scheduled for June 2025. Dkt. Nos. 85, 91.

The Court notes with concern that Mounce’s successive motions have consumed precious judicial resources and delayed proceedings without demonstrable benefit. Mounce has identified no change in controlling law, no newly discovered evidence of significance, and no manifest injustice requiring correction.

1 *See Kische USA LLC v. Simsek*, 2017 WL 5881322, at \*3 (W.D. Wash. Nov. 29,  
2 2017). The motion is thus DENIED.

3 **4. CONCLUSION**

4 Accordingly, the Court DENIES Mounce's motion for partial summary  
5 judgment, Dkt. No. 86, and his motion for leave to file a third partial summary  
6 judgment motion, Dkt. No. 96.

7 Dated this 9th day of April, 2025

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10 Jamal N. Whitehead  
11 United States District Judge  
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